Supreme Court, U.S.
FILED

94 411 SEP - 6 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

PIPING OF OHIO, INC.,

Petitioner,

v.

ROBERT B. REICH, SECRETARY OF LABOR;
THE OCCUPATIONAL SAFETY &
HEALTH REVIEW COMMISSION,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

ALBERT T. BROWN, JR., ESQ.
BROWN & WARNOCK
2550 Kroger Building
1014 Vine Street
Cincinnati, OH 45202
(513) 621-2825

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. IS THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION REQUIRED OR PERMITTED TO ABANDON ITS DEFINED ROLE AS "NEUTRAL ADJUDICATOR" IN A QUEST FOR THE ELIMINATION OF ALL POSSIBLE RISKS OF INJURY IN THE WORKPLACE?

2. CAN THE ENHANCED PENALTIES PROVIDED UNDER 29 U.S.C. § 666(A) FOR "REPEAT" VIOLATION OF OSHA REGULATIONS BE CONSTITUTIONALLY APPLIED WHERE THE STANDARD IS AMENDED BETWEEN THE CITATIONS AND, THE PRIOR CITATION CONTAINS NO ADMISSION OF FACT?

3. WHAT IS THE PROPER ANALYSIS OF THE "SERIOUS" CLASSIFICATION OF VIOLATIONS UNDER 29 U.S.C. § 666 (J). AND "DE MINIMIS" AS DEFINED IN 29 U.S.C. § 658. A POINT UPON WHICH THERE IS A DIVERGENCE OF OPINION BETWEEN THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, THE SECRETARY OF LABOR, THE THIRD AND FIFTH AND SIXTH AND NINTH CIRCUITS?

4. DID THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION AND THE JUDGE OF THE REVIEW COMMISSION FAIL TO DEVELOP AND APPLY CONSTITUTIONALLY ADEQUATE DEFINITIONS OF THE TRAINING REQUIREMENTS OF 29 C.F.R. § 1926.21(B)(2) AND "COMPETENT PERSON" REQUIREMENTS OF 29

QUESTIONS PRESENTED – Continued

C.F.R. § 1926.651(K)(1) TO THE EXTENT THAT DEFERENCE SHOULD BE WITHHELD FROM THEIR CONCLUSIONS ON THE MIXED QUESTION OF LAW AND FACT PRESENTED?

5. DID THE ADMINISTRATIVE LAW JUDGE IMPERMISSIBLY AMEND THIS COMPLAINT *SUA SPONTE* AND OTHERWISE ACT ARBITRARILY, CAPRICIOUSLY, UNREASONABLY OR OTHERWISE ABUSE HIS DISCRETION AND FAIL TO CONDUCT A FAIR AND IMPARTIAL HEARING?

6. IS THERE A RESIDUE OF ACTIVITY TO WHICH THE COMMERCE CLAUSE DOES NOT EXTEND?

LIST OF PARTIES AND STATEMENT OF CORPORATE AFFILIATION

Petitioner is affiliated with no other corporate entity either as parent, subsidiary or otherwise.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND STATEMENT OF CORPORATE AFFILIATION iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

CASES vi

STATUTES viii

REGULATIONS viii

OTHER ix

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

REGULATIONS 3

STATEMENT OF THE CASE 4

The Investigation 5

The Hearing 8

The Decision 10

TABLE OF CONTENTS – Continued

Page

REASONS FOR GRANTING THE WRIT 11

THE CLASSIFICATION OF PETITIONER'S ALLEGED TRENCH VIOLATION AS "REPEATED" WHERE THE REGULATION HAD BEEN AMENDED BETWEEN CITATIONS AND THE PRIOR CITATION WAS SETTLED WITHOUT FACTUAL ADMISSIONS IS CONTRARY TO LAW 14

THIS COURT'S SUPERVISION IS REQUIRED IN ORDER TO END THE WAY TUG OF WAR BETWEEN THE SECRETARY OF LABOR, THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND THE THIRD AND FIFTH, AND THE SIXTH AND NINTH JUDICIAL CIRCUITS REGARDING THE CLASSIFICATION OF ALLEGED VIOLATIONS AS DE MINIMIS ... 17

THE SUBJECTIVE EVALUATION OF A TRAINING PROGRAM AS INADEQUATE DOES NOT GIVE REGULATED PARTIES NOTICE CONSISTENT WITH TRADITIONAL CONCEPTS OF DUE PROCESS OF AN AGENCY'S UNDERSTANDING OF THE LAW 26

THE ADMINISTRATIVE LAW JUDGE IMPERMISSIBLY AMENDED THIS COMPLAINT *SUA SPONTE* AND OTHERWISE ABUSED HIS DISCRETION AND FAILED TO CONDUCT A FAIR AND IMPARTIAL HEARING 29

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

American Dredging Co. v. Miller, 510 U.S. ___, 114 S. Ct. 981 (1994) 16

California Stevedore and Ballast Co., 517 F.2d 986 (9th Cir. 1975) 22

Concrete Construction Co., 15 O.S.H.Cas. (BNA) 1615 (Review Comm., 1992) 23, 30

Cuyahoga Valley Railway Co. v. United Transportation Union, 474 U.S. 3 (1985) 5, 12, 13, 25

Daniel Construction Co., 10 O.S.H.Cas. (BNA) 1254 (Review Comm., 1991) 18

Director, OWCP v. Greenwich Collieries, ___ U.S. ___, 114 S. Ct. 2251 (1994) 16

Donovan v. A. Amorello and Sons, Inc., 761 F.2d 61 (1st Cir. 1985) 25

Donovan v. Daniel Construction Co., 692 F.2d 818 (1st Cir. 1982) 18

Dun-Par Engineered Forms Co. v. Marshall, 676 F.2d 1333 (10th Cir. 1982) 14

Erie Coke Corp., 15 O.S.H.Cas. (BNA) 1561 (Review Comm. 1992) 19

Estate of Cowart v. Nicklos Drilling Co., ___ U.S. ___, 112 S. Ct. 2589 (1992) 21

Ford Development Co., 15 O.S.H.Cas. (BNA) 2003 (Review Comm., 1992) 26

Industrial Union v. American Petroleum Institute, 448 U.S. 607 (1980) 12, 25

TABLE OF AUTHORITIES – Continued

Page

Jack Conie and Sons, Corp., 14 O.S.H.Cas. (BNA) 2149 (ALJ-Digest, OSHRC docket 81-3149, 1992) 27

Martin v. American Cyanamid Co., 5 F.3d 140 (6th Cir. 1993) 25

Martin v. OSHRC, 499 U.S. 144 (1991) 13, 16, 25

Mobil Oil Corp. v. FTC, 417 U.S. 283 (1974) 24

National Industrial Constructors v. OSHRC, 583 F.2d 1048 (8th Cir. 1978) 29

National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973) 26

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 24

Phoenix Roofing v. Dole, 874 F.2d 1027 (5th Cir. 1989) 19, 24

Potlatch Corp., 7 O.S.H.Cas. (BNA) 1061 (Review Comm., 1979) 14, 15, 16

Reich v. OSHRC (Erie Coke Corp.), 998 F.2d 134 (3d Cir. 1992) 19

Secretary of Labor v. Briggs Construction Co., 942 F.2d 318 (6th Cir. 1991) 29

Thomas Jefferson University v. Shalala, ___ U.S. ___, 114 S. Ct. 2381 (1994) (Thomas J., dissenting) 24, 27

Universal Camera Corp. **v. NLRB**, 340 U.S. 474 (1951) 24

Usery v. Hermitage Concrete Pipe Co., 584 F.2d 127 (6th Cir. 1978) 22, 23

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. § 556(d) 16

29 U.S.C. § 651(b) 12, 22

29 U.S.C. § 658 ..... 2, 18

29 U.S.C. § 659(c) 18

29 U.S.C. § 666 ..... 2, 13, 17

29 U.S.C. § 666(a) 2, 10, 14, 17

29 U.S.C. § 666(b) 17

29 U.S.C. § 666(i) 2, 18

29 U.S.C. § 666(j) 2, 17, 20

Comprehensive Budget Reconciliation Act of 1990
P. L. 101-508, 104 Stat. 1388-29 ..... 10, 13

REGULATIONS

29 C.F.R. § 1926.21 ..... 3, 26

29 C.F.R. § 1926.651 ..... 3, 10

29 C.F.R. § 1926.651(c)(2) 30

29 C.F.R. § 1926.651(k)(1) 28

29 C.F.R. § 1926.652(a)(1) 4, 7, 8

29 C.F.R. § 1926.652(b) (superceded 54 Fed.Reg.
49959 (October 31, 1989) 8, 10

29 C.F.R. § 1926.652 Subpt. P 6

TABLE OF AUTHORITIES – Continued

Page

OTHER

54 Fed. Reg. 45949-53 22

24 Occupational Safety and Health Reporter #9 p. 404 (BNA) (July 27, 1994) 12

54 Fed. Reg. 49959, October 31, 1989 ..... 8, 10

OSHA Field Operations Manual, Chapter VI-V-5 20

The Petitioner, Piping of Ohio, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled proceeding on June 8, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit was not approved for publication, and is reprinted in the appendix hereto, p. 1a, *infra.*

The Decision and Order of the Administrative Law Judge of the Occupational Safety and Health Review Commission has not been officially published. It is reprinted in the appendix hereto, p. 5a, *infra.*

JURISDICTION

Review is sought of the judgment of the Sixth Circuit Court of Appeals, entered June 8, 1994, affirming the decision and order of an Administrative Law Judge of the Occupational Safety and Health Review Commission which became final on April 5, 1993.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, provides in pertinent part as follows:

§ 658 Citations

(a) Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations. If, upon inspection or investigation, the secretary . . . believes that an employer has violated a requirement of . . . any standard rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

§ 666 Civil and Criminal Penalties

(a) Willful or repeated violation. Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard rule or order promulgated pursuant to section 6 of this Act or regulations prescribed pursuant to this Act may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

(i) Authority of the Commission to assess civil penalties. The Commission shall have authority to assess all civil penalties provided in this section giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer and the history of previous violations.

(j) Determination of serious violation. For purposes of this section, a serious violation shall be deemed

to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

REGULATIONS

The following regulations, adopted by the Secretary of Labor pursuant to 29 U.S.C. § 655 are pertinent to the issues raised herein.

29 C.F.R. § 1926.21 Safety training and education

(b) ***Employer responsibility***

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

29 C.F.R. § 1926.651 General requirements

(c) ***Access and egress***

(2) ***Means of egress from trench excavations.*** A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees.

(k) ***Inspections.***

(1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

29 C.F.R. § 1926.652 Requirements for protective systems.

(a) ***Protection of employees in excavations.***

(1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

STATEMENT OF THE CASE

The Secretary of Labor sought enforcement of two citations issued by the Occupational Safety and Health Administration before the Occupational Safety and

Health Review Commission.[1] The citations alleged four violations of regulations adopted under the Act.

After a hearing, an Administrative Law Judge of the Commission entered his decision and order (App. 5a-25a) assessing $10,000 in penalties for the violations; the Judge's order became a final order of the Commission after discretionary review was withheld.

A timely appeal to the Sixth Circuit Court of Appeals was perfected and disposed of by that court's Per Curiam order dated and entered June 8, 1994, affirming the Commission's order. (App. 1a-4a)

Piping is a family business which employed six or seven persons in the installation of a water line from and to locations entirely within the premises of the ARMCO steel company plant in Middletown, Ohio, using pipe supplied on premises by ARMCO.

The Investigation

Following the report to the Occupational Safety and Health Administration of the existence of a trench from the business agent for the employees of a unionized competitor of Piping, an industrial hygienist (Sweeney) conducted a cursory inspection of Piping's work site on November 20, 1991, after work had ceased for the day, and recommended that an occupational safety compliance officer view the site.

---

[1] The OSHRC serves as the neutral adjudicator of contested cases arising under the Occupational Safety and Health Act of 1970, ***Cuyahoga Valley Ry. Co. v. United Transp. Union***, 474 U.S. 3 (1985).

CHSO Boylan arrived at the scene at about 7:00 a.m. on November 21, 1991, and observed two trenches running generally east and west. Each trench was approximately seven feet deep and was bounded on the south by a 48-inch steam line along which were located poured concrete pier caps which supported the steam line and extended above it. The east trench was bounded at either end by poured concrete "steam pits" which extended above and below ground. The west trench extended from steam pit 53 further west.

Counsel for the Secretary stipulated at hearing that:

> "The Secretary is not alleging that the south wall was a hazard. We are strictly pointing out the north wall of the excavation."

When the CHSO arrived two employees were observed in the west trench approximately fifteen feet west of steam pit 53. The compliance officer made measurements of the slope of the trench some few feet further west, recording a measurement of 34° (a permissible slope under the most stringent reading of the regulations) on the south wall. He measured a slope of 52° on the north wall at this point and subjectively stated that the employees exited the trench at his request with difficulty.[2]

---

[2] OSHA regulations permit the following slopes in the following types of soil:

Stable rock	90°
Type A	53° (except that trenches 12 ft. or less in depth and short term shall have a maximum allowable slope of 1/2; 1(63°);
Type B	45°
Type C	34°

29 C.F.R. § 1926.652, Subpt. P.

Boylan also testified to the effect that he made one measurement of a trench slope of 68° at an unspecified location in the north wall of the east trench.[3]

Boylan conducted interviews of Piping's employees at the site, which were not recorded, took samples of the soil disturbed by the excavation, photographs and left the scene.

Boylan, who had no construction industry experience prior to his employment by OSHA and limited training in the regulations as amended in 1990, initially classified the samples of disturbed soil he took as OSHA type C soil. Following this investigation, Boylan issued two citations charging a total of four violations of the Secretary's regulations.

After filing of the notice of contest, OSHA's soils laboratory determined that the soil was Type B, without reference to the degree of compaction that the soil exhibited; which would materially affect its actual performance.[4]

The first three violations, discussed in detail below, were grouped in Citation No. 1 as serious violations, the fourth violation, a violation of 29 C.F.R. § 1926.652(a)(1) was cited as a willful violation.

---

[3] The making of this observation or measurement was disputed by Piping; the making of this measurement was nowhere recorded by Boylan in his notes of inspection completed several days after the inspection.

[4] There is nothing in the record to suggest that the trial judge considered the uncontroverted testimony offered by Petitioner's soils expert that this soil would safely hold an angle of repose of 80°.

A timely notice of contest was filed and, after the deposition of the compliance officer was taken, the Secretary sought and received leave to amend the complaint in respect of the second citation to allege a repeat violation of 29 C.F.R. § 1926.652(a)(1) premised upon Piping's 1989 citation for a violation of 29 C.F.R. § 1926.652(b)[5] which had been settled by agreement of the parties.

The Hearing

The matter proceeded to hearing before an Administrative Law Judge of the Commission.

No evidence described the likelihood of the collapse of the excavation, although Piping's employees did testify that the soil was as hard as they had seen, based upon manual tests and the performance of the excavating equipment.

With respect to the training violation the ALJ conducted his own safety quiz of the Piping employees present at the site (App. 13a-16a) and held that:

> "they did not receive adequate instruction in the recognition and avoidance of safety hazards. They were unaware of the requirements of the excavation standard. Piping's employees were relying on intuition, and not specific guidelines, to tell them whether or not a trench was safe." (App. 16a)

The record contained no evidence of industry practice, or expert opinion beyond that supplied by the

---

[5] The Administration published revised regulations 54 Fed. Register 49959, October 31, 1989 (effective March 5, 1990).

Administrative Law Judge and did not credit the uncontroverted testimony that regular weekly general safety meetings were held when employees of this multi-site employer turned in their time cards as well as job specific meetings. Nor, did the record credit the compliance officer's documented notation that "the employees were aware of sloping, shoring and trench boxes, but 'were not sure of' the specific provisions" of specific regulations.

No evidence presented at the hearing described the conditions or hazard presented by the 1989 violation.

The CHSO who was asked what hazard was cited in 1989 did not answer that question, nor had he conducted any pre- or post-inspection review of the factual allegations made in 1989 (Rec. Vol. III, Tr. pp. 368-369).

The trial court, in taking judicial notice of the existence of the documents reflecting the final order of the Commission, found as fact that Piping's conduct on November 29, 1989 was:

> " . . . substantially similar to Piping's violation of § 1926.652(a)(1) in the present case . . . . the hazard presented by both violations is that of a cave-in. The violation will be affirmed as a repeated violation." (App. 22a-23a)

After the close of the hearing, the Administrative Law Judge established deadlines for the filing of simultaneous briefs and issued his decision and order (5a-25a).

The Decision

That decision adopted two positions not embraced within the complaint or the citations as issued and not tried by implied consent. First, the judge ruled that Thomas Moore, the designated "competent person" at the site was not competent; and secondly, that the fact that employees of Piping exited the east trench on the day prior to the inspection without using a ladder established a violation.

That decision further embraced an "effect on competition" argument and published conclusions that the making of toll telephone calls and use of the mail are evidence of an "affect upon interstate commerce".

The decision affirmed each of the three violations cited under Citation No. 1 as serious violations and found that the violation alleged in Citation No. 2 was a repeat violation but not a willful violation and made no finding as to the seriousness of the violation.

The trial judge classified the trench sloping violation contained within the Citation No. 2 as a repeat violation under 29 U.S.C. § 666(a). This rendered the employer liable to a penalty of not more than $70,000 under the terms and provisions of Public Law 101-508 effective November 5, 1990.

The regulation at issue in Citation No. 2, 29 C.F.R. § 1926.651 became effective March 5, 1990,[6] or 132 days after Piping was charged with a violation of 29 C.F.R.

---

[6] 54 Fed. Reg. 49959, October 31, 1989.

§ 1926.652(b) which was replaced by the standard here cited.

Piping had filed a notice of contest of that citation and concluded that contest with a settlement agreement providing in pertinent part as follows:

> "Nothing contained herein shall be construed as an admission of Employer that it violated any of the OSHA regulations referred to in the Citations and it is acknowledged that it is entering into this settlement agreement only to resolve the matter as expeditiously as possible and to avoid protracted litigation. This settlement is not to be taken as an admission of fault or liability and shall not affect any rights or defenses in the future that the employer may have in any other proceeding other than one arising under the Occupational Safety and Health Act." (Exhibit G-17)

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the decision below has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this Court's power of supervision to reestablish the role of the Occupational Safety and Health Review Commission as a neutral adjudicator.

Although the hortatory language of the preface to the Occupational Safety and Health Act of 1970 is often recited;

> "to assure so far as possible . . . safe and healthful working conditions for every working man and woman in the Nation." 29 U.S.C. § 651(b).[7]

the caution expressed by Mr. Chief Justice Burger for the plurality in ***Industrial Union v. American Petroleum Institute***, 448 U.S. 607 (1980) appears to have been ignored in the case at bar:

> "Nevertheless, when discharging his duties under the statute, the Secretary is well admonished to remember that a heavy responsibility burdens his authority. Inherent in this statutory scheme is authority to refrain from regulation of insignificant or de minimis risks. (citation omitted) When the administrative record reveals only scant or minimal risk of material health impairment, responsible administration calls for avoidance of extravagant, comprehensive regulation. **Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible.**" 448 U.S. 607, 663-664.

In 1985, this Court defined the role of the Occupational Safety and Health Review Commission in ***Cuyahoga Valley Railway Co. v. United Transportation Union,*** 474 U.S. 3 (1985).

> "to act as neutral arbiter and determine whether the Secretary's citations should be enforced over

---

[7] Since passage of the Act, the number of workplaces covered by the Act has risen from 3.5 million to 6 million and the number of workers covered has grown from 58 million to 96 million.

"OSHA Program at 'Critical Juncture' Union, Business, Government Officials Told", **24 Occupational Safety and Health Reporter #9 p. 404 (BNA) (July 27, 1994).**

> employee[8] (sic) or union objections." 474 U.S. 3, 7.

and reaffirmed that Congress did not intend the Commission (and by extension its Administrative Law Judges) to have both prosecutorial and adjudicatory functions.

In 1990 Congress adopted provisions of the Comprehensive Budget Reconciliation Act of 1990 P. L. 101-508, 104 Stat. 1388-29, which amended the OSHA penalty scheme at 29 U.S.C. § 666 by permitting a sevenfold increase in the size of penalties to a maximum of $70,000.

In ***Martin v. OSHRC***, 499 U.S. 144 (1991), a unanimous Court reaffirmed the "split enforcement" view of the powers of the agency and the Commission and held that protection against biased interpretation of the regulations was achieved by Commission and court of appeals' review of the Secretary's interpretation of the regulations.

> "to assure that it is consistent with the regulatory language and *is otherwise reasonable.*" ***Martin***, *id.* at 158.

In that case, the Court continued to "emphasize that the reviewing court should defer to the Secretary only if the Secretary's interpretation *is reasonable.*" ***Martin***, *id.*

Such a review is subject to the same standard of substantive review as any other exercise of designated lawmaking power. ***Martin***, *id.* The Court, there, further observed that decision to use a citation as the initial means for announcing a particular interpretation may

---

[8] It would seem that the word "employer" is required by the context.

bear upon the adequacy of notice to regulated parties, the quality of the Secretary's elaboration of pertinent policy considerations and other factors relevant to the Secretary's exercise of delegated lawmaking powers.

It is respectfully urged, that in each instance below neither the Commission nor the court of appeals discharged their separate duties to address the reasonableness of the Secretary's interpretation of the four regulations here at issue; or the imposition of "serious" as opposed to "de minimis" penalties or, the characterization of the trench sloping violation as "repeat".

THE CLASSIFICATION OF PETITIONER'S ALLEGED TRENCH VIOLATION AS "REPEATED" WHERE THE REGULATION HAD BEEN AMENDED BETWEEN CITATIONS AND THE PRIOR CITATION WAS SETTLED WITHOUT FACTUAL ADMISSIONS IS CONTRARY TO LAW

Reaching a consensus of construction of § 17(a) of the Act, 29 U.S.C. § 666(a):

> "Any employer who willfully or repeatedly violates the requirement of § 654 of this title, any standard, rule, or order promulgated pursuant to § 655 of this title"

in the absence of a congressional mandate was not easy.

As historically described in ***Dun-Par Engineered Forms Co. v. Marshall***, 676 F.2d 1333 (10th Cir. 1982), the Tenth Circuit adopted the test first enunciated by a majority of the Review Commission in ***Potlatch Corp.***, 7 O.S.H.Cas. (BNA) 1061 (Review Comm., 1979), OSHD

(CCH) ¶ 23,294; other circuits have followed that construction.

In ***Potlatch***, the Commission announced the following principle:

> "a violation is repeated under § 17(a) of the Act if at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation."

As an outline of proof, the Commission continued:

> "the Secretary may establish a prima facie case of similarity by showing that the prior and present violations are for failure to comply with the same standard."
>
> "In the absence of evidence that the antecedent and present violations concern non-compliance of the same standard, the Secretary must present *other evidence that* the violations are substantially similar in nature. In this regard, we think that evidence that the violations involve similar hazards would be relevant." (Emphasis supplied.)

Nowhere, however, does the Commission address the issue raised by the amendment of a regulation or the adoption of an additional regulation related to the same hazard between alleged violations.

As noted the ALJ concluded, from an empty record, that "the hazard presented by both violations is that of a cave-in".

However, the disposition of the previous citation by a settlement agreement forecloses a construction of the settlement agreement as a judicial admission that facts constituting a violation of the Act occurred, and substantially distinguishes this case from ***Potlatch,*** where the employer had not contested the previous violation.

We further submit that the simplified showing contemplated by the Commission of:

a) the present violation, and

b) proof of the existence of a final order

7 O.S.H.Cas. 1061, 1065

as creating a prima facie case, which shifts the burden of going forward with the evidence to the employer erroneously reallocated the burden of proof and impermissibly violates the fundamental provision of the Administrative Procedure Act, 5 U.S.C. § 556(d)

> " . . . except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

The question of burden of proof is a matter of substance. *See* ***Director, OWCP v. Greenwich Collieries,*** ___ U.S. ___, 114 S. Ct. 2251 (1994); ***American Dredging Co. v. Miller,*** 510 U.S. ___, 114 S. Ct. 981 (1994).

We submit that in a case involving the imposition of penalties which may approach $70,000 in an ever shifting regulatory environment that some evidence other than multiple inferences pyramided from a contested record satisfy the tests of due process and reasonable notice to regulated parties. ***Martin v. OSHRC,*** 499 U.S. 144 (1991)

THIS COURT'S INTERVENTION IS REQUIRED IN ORDER TO END THE TUG OF WAR BETWEEN THE SECRETARY OF LABOR, THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND THE THIRD AND FIFTH, AND THE SIXTH AND NINTH JUDICIAL CIRCUITS REGARDING THE CLASSIFICATION OF ALLEGED VIOLATIONS AS DE MINIMIS.

In 29 U.S.C. § 666, Congress adopted a three tier system of classifying violations of provisions of the Act:

§ 666(a) provides for willful or repeated violations now penalized to a maximum of $70,000;

§ 666(b) provides for a penalty of up to $7,000 for a serious violation of the requirements of § 5 of the Act and defines a serious violation in § 666(j);

§ 666(c) provides for the imposition of an other than serious penalty not to exceed $7,000;

§ 666(j) defines a serious violation in the following language:

> "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations or processes which have been adopted or are in use in such place of employment . . . "

In assessing civil penalties, the Commission shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the

good faith of the employer and the history of previous violations. 29 U.S.C. § 666(i)

Under 29 U.S.C. § 658, the Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations "which have no direct or immediate relationship to safety or health."

The Review Commission has, since 1982, accepted and espoused the view that three separate levels of violations were established by the Act: serious, non-serious and de minimis. And further that the Commission could reclassify a violation. By application of 29 U.S.C. § 659(c) which granted the Commission authority to issue an order based on findings of fact, affirming, modifying or vacating the Secretary's citation or proposed penalty or directing other appropriate relief. ***Daniel Construction Co.***, 10 O.S.H.Cas. (BNA) 1254, aff'd ***Donovan v. Daniel Construction Co.***, 692 F.2d 818 (1st Cir. 1982):

> " . . . The Secretary's guidelines for de minimis violations include a situation which the employer complies with the clear intent of the standard but deviates from its particular requirement in a manner in which has no direct or immediate relationship to safety or health. These deviations may be distance requirements, material requirements, the use of color, specifications and sign wording . . . "
>
> 692 F.2d 818, 821

More recently, the Secretary asserted that by operation of 29 U.S.C. § 658 the assignment of the de minimis classification to an alleged violation was a preliminary

prosecutorial charging decision unreviewable at any subsequent stage of the proceedings and that the Commission did **not** have the authority to reclassify a violation from serious to de minimis in ***Erie Coke Corp.***, 15 O.S.H.Cas. (BNA) 1561 (Review Comm., 1992). That construction of the role of the Commission was rejected by the Third Circuit in ***Reich v. OSHRC*** (Erie Coke Corp.), 998 F.2d 134 (3d Cir. 1992).

In reversing the Commission determination that a violation was "serious", in ***Phoenix Roofing v. Dole***, 874 F.2d 1027 (5th Cir. 1989), the Court of Appeals identified at least three circumstances under which a violation may be considered de minimis:

(1) where no injury will result, or any injury will be minor;

(2) where the possibility of injury is remote, or;

(3) where there is no significant difference between the protection provided by the employer and that which would be afforded by technical compliance with the standard.

874 F.2d 1027, 1032

In that case, the Court of Appeals proceeded to consider only the third type of de minimis circumstance ruling:

> "these are two separate issues that are not and should not be subject to the same considerations. To say that an employer commits a violation when it knowingly contravenes regulations, regardless of a good faith that it is adequately

> protecting its employees' interests is hardly surprising. **However, to extend such reasoning to suggest that employers always commit serious violations when they deviate from the black letter of the regulations even where the alternative protections equal or exceed those mandated by law, is quite another thing.** The latter rule would eviscerate the de minimis category and could even prevent certain jobs from being performed where, as here, strict technical compliance is infeasible even though non-conforming measures might easily assure safety." *Id.*

We submit that to the extent that no provision is made within the OSHA Field Operations Manual, Chapter VI-V-5, for assessing the likelihood of harm between "relatively high" and "relatively low" there is a clear deviation from the congressional syntax of 29 U.S.C. § 666(j):

> "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations or processes which have been adopted or are in use in such place of employment . . . "

which leaves no doubt that substantial probability modifies and qualifies the verb phrase "could result". As should be axiomatic:

> "in the statutory construction case, the beginning point must be the language of the statute, and when the statute speaks with clarity to an issue, judicial inquiry into the statute's meaning and all but the most extraordinary circumstance,

> is finished." ***Estate of Cowart v. Nicklos Drilling Co.***, ___ U.S. ___, 112 S. Ct. 2589 citing ***Demarest v. Manspeaker***, 498 U.S. ___, 111 S. Ct. 599, 603 (1991)

In the instant case, evidence regarding the probability of injury at the precise job site was summarily rejected by the trial court.

"MR. BROWN: If Your Honor please, could I have a record on the issue of probability?

"JUDGE BURROUGHS: Probability has nothing to do with it. The standard assumes the worst.

"MR. BROWN: I understand that the standard is –

"JUDGE BURROUGHS: That has already been taken into consideration that you don't decide whether there is a violation on the probability. The standard assumes that it's going to happen, and that's the basis it is made on, and it may not happen frequently in this area but in my area, it has resulted in a lot of deaths in the last three years.

"Now, when a contractor gets a citation, he gets a $70,000.00 penalty for each violation. So, they're trying to put a stop to it, and it doesn't matter what he thinks the probability would be or not. He didn't promulgate the regulations. It's the Secretary. And the Secretary promulgated it for a cause, and there have been a lot of deaths in trenches.[9]

---

[9] In the findings that preceded adoption of the 1990 amendments to the regulations, the Secretary concluded that existing data did **not identify** a number of deaths attributed to trenching

"MR. BROWN: Well, in Atlanta, Your Honor, I –

"JUDGE BURROUGHS: Well, the standard isn't done on a regional basis. It's done on a national basis. Atlanta and Dallas just happen to have the largest number of catastrophes resulting, but they enact or promulgate the standards to cover all the states."

(Vol. III, Tr., pp. 430-2)

That holding is arguably supported by the Ninth Circuit's holding in ***California Stevedore and Ballast Co.,*** 517 F.2d 986 (9th Cir. 1975) where the court rejected the employer's claim that the probability requirement of the statute related both to the likelihood of an accident as well as the degree of harm that accident might cause on the basis that the hortatory aspirational language of 29 U.S.C. § 651(b) justified the conclusion that:

> "If the harm that the regulation was intended to prevent was death or serious physical injury, then its violation is serious per se." 517 F.2d 986, 988, n.1.

The Sixth Circuit adopted ***California Stevedore,*** but held, in ***Usery v. Hermitage Concrete Pipe Co.,*** 584 F.2d 127 (6th Cir. 1978) that the Secretary was required to show a substantial probability that death or serious physical harm 'could' rather than 'would' result from:

---

accidents; nor did the data establish the number of injuries related to trenching accidents. Rather, statistical extrapolation was used to project that the revised regulation would result in one less death and 1071 fewer injuries on an annual basis. 54 Fed. Reg. 45949-53.

> *"the condition which has been shown actually to exist in the place of employment."* 584 F.2d 127, 133.
>
> " . . . We do not address the question of whether the Secretary might by regulation, establish a level of dust which constitutes *per se* a 'serious' violation of the Act. The fact is *he has not done so.* Absent this issue, we believe that the fundamental responsibility for determining the seriousness of the violation, *under a proper standard of law,* rests in the Commission." *Id.* (Emphasis supplied.)

As stated by a majority of the Commission in construing the earlier version of the trenching regulations ***Concrete Construction Co.,*** 15 O.S.H.Cas. 1615 (Review Comm., 1992):

> **"The mere fact that Concrete's trenches may also not have been sloped, as the "general" provisions at section 1926.652(b) and (c) require, does not preclude a finding of "de minimis" violation in this case, where the evidence establishes only a remote or insignificant possibility that the backfill itself might collapse."** *Id.* at 1623.

In the instant case, counsel for petitioner was explicitly denied the opportunity to even make a record on the issue of probability of harm (or the likelihood in fact of the collapse of this trench) arising from the conditions actually shown to exist in the place of employment, or the effectiveness of the protections provided by the employer for any purpose.

In the instant case, issuance of a citation for a deviation of 7° in the slope of only one side of a seven foot

deep trench, in extremely hard ground at the location of employee exposure; where the other side of the trench was fully supported and adequately sloped; (See remarks of counsel, p. 6, *supra*) and, a wholly unsupported observation of a steeper trench slope where no connection with employee exposure was shown; clearly evidenced overzealous, hyper-technical and counter-productive enforcement of the safety regulations. In light of uncontroverted evidence of employer compliance with the purposes of the regulation. ***Phoenix Roofing***, *supra*.

We suggest that the Administrative Law Judge was required to evaluate the patent difference between the trench dug by Piping and, the hypothetical worst case trench, of undefined depth with vertical sides in the soils of Atlanta or Dallas that the ALJ clearly felt the regulation permitted him to assume.

We submit that a construction of a regulation, and a regulatory scheme, which assumes the worst in the face of relevant and uncontradicted evidence to the contrary results in either the misapprehension or gross misapplication of a regulatory standard enjoined in ***Mobil Oil Corp. v. FTC***, 417 U.S. 283, 310 (1974); ***Universal Camera Corp. v. NLRB***, 340 U.S. 474, 491 (1951).

As in ***Thomas Jefferson University v. Shalala***, ___ U.S. ___, 114 S. Ct. 2381, 2390 (1994) (Thomas J., dissenting) and ***Pennhurst State School and Hospital v. Halderman***, 451 U.S. 1 (1981), the precatory language of a statutory introduction is too thin a reed to support the substantive effect argued for it by the Secretary.

At the root of the debate regarding the classification of a violation, of course, is the ultimate decision with

respect to which administrative actor the courts must give final approval in the penalty context.

Although the Fourth, Eighth, Second and Sixth Circuits were described as favoring the Commission, while the Fifth and Tenth Circuits were believed to favor the Secretary in ***Donovan v. A. Amorello and Sons, Inc.***, 761 F.2d 61 (1st Cir. 1985), subsequent cases, e.g. ***Martin v. American Cyanamid Co.***, 5 F.3d 140 (6th Cir. 1993) would indicate that ***Martin v. OHSRC***, 499 U.S. 144 (1991), has been construed to resolve that uncertainty in favor of the Secretary in the Sixth Circuit.

This has resulted in a closed-loop enforcement system where the powers of investigation, citation, prosecution and interpretation of the regulations are vested in the Secretary; while the Commission, originally conceived as the neutral adjudicator, retains only the power of ratification of the Secretary's current enforcement policy rather than the neutral adjudicatory role created in the Act. ***Cuyahoga Valley Railway Co. v. United Transportation Union***, 474 U.S. 3 (1985).

Nothing within the 24-year history of proceedings under the Act suggests that the Secretary has heeded the call of former Chief Justice Burger for the avoidance of extravagant, comprehensive regulation in the search for the impossible chimera of perfect safety. ***Industrial Union v. American Petroleum Institute***, 448 U.S. 607, 665 (1980).

THE SUBJECTIVE EVALUATION OF A TRAINING PROGRAM AS INADEQUATE DOES NOT GIVE REGULATED PARTIES NOTICE CONSISTENT WITH TRADITIONAL CONCEPTS OF DUE PROCESS OF AN AGENCY'S UNDERSTANDING OF THE LAW

We respectfully submit that in conducting a "safety quiz" (p. 8, *supra*) measured solely by the familiarity of Piping's employees with the precise language of the regulations to establish a violation of 29 C.F.R. § 1926.21(b)(2), the Administrative Law Judge attempted to serve as the Secretary's expert witness, in so doing, he exceeded his constitutional role as neutral fact-finder and went beyond that limit to which judicial deference to his findings of fact and/or conclusions is required. ***National Realty & Construction Co. v. OSHRC***, 489 F.2d 1257 (D.C. Cir. 1973):

> "The regulation, at a minimum requires that an employer apprise its employees of applicable regulations *and issue general instructions* on how employees may recognize and avoid dangerous conditions." ***National Industrial Constructors v. OSHRC***, 583 F.2d 1048, 1053 (8th Cir. 1978) (Emphasis supplied.)

The Commission's most recent position on training, published after the hearing and briefing of the instant case before the ALJ is as follows:

> "Our decision should not be read as requiring employers always to demand that the employees undergo formalized training, nor as compelling employers in every instance to gather written evidence of job skills." ***Ford Development Co.***, 15 O.S.H.Cas. (BNA) 2003, 2009 (Review Comm., 1992).

As recently observed:

> "it is perfectly understandable, of course, for an agency to issue vague regulations because to do so maximizing agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rule making process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." ***Thomas Jefferson University v. Shalala***, ___ U.S. ___, 114 S. Ct. 2381, 2393 (1994) (Thomas, J., dissenting).

We submit that the aspirational language of the regulations as conclusorily interpreted by the trial court that Piping's employees did not receive "adequate instruction" (App. 16a) leaves far too much discretion in the subjective judgment of the enforcement officer and the trial judge to be consistent with any concept of adequate notice of what would constitute adequate instruction.

However, more than 100 of the Act's current standards do contain training programs and, as related to hazardous communications alone, over 7,500 alleged violations of training programs related to hazardous communications alone were cited in fiscal 1992.

In ***Jack Conie and Sons, Corp.***, 14 O.S.H.Cas. (BNA) 2149 (ALJ-Digest OHSRC docket 81-3149) an alleged **nonserious** violation for failing to develop, implement and maintain a written hazard communication program was vacated upon the trial judge's finding that:

> "merely questioning workers on their knowledge of a 'hazard communication' program

> without explaining the terms, meaning or asking further questions, is not a complete investigation, particularly when dealing with workers who are unskilled and inarticulate. The fact that employees are unfamiliar with the specific terminology used by OSHA in its standards does not mean that their employer is not in compliance."

Given the suggestions embodied in counsel's questions that formal classes, with mandatory recorded attendance, that focus on the language of the regulations may or may not be adequate, the sheer number of training programs mandate that either a two year cycle of weekly meetings or a six-month cycle of daily meetings are necessary to cover the subjects of regulation. Under the latter regime, of course, the employees perform no work.

Each of the foregoing arguments applies with equal force to construction of 29 C.F.R. § 1926.651(k)(1) which requires the daily inspections of trench work by subjectively defined "competent person". Here, as noted in the Decision (App. 19a) the trial court concluded that Thomas Moore, the designated competent person of site at the time of the arrival of the CHSO was not a competent person "because he had not performed a manual test of the soil" ignoring the uncontroverted record that manual tests, had been performed in Tom's presence and under his supervision by a different competent person, his brother Randy.

THE ADMINISTRATIVE LAW JUDGE IMPERMISSIBLY AMENDED THIS COMPLAINT *SUA SPONTE* AND OTHERWISE ABUSED HIS DISCRETION AND FAILED TO CONDUCT A FAIR AND IMPARTIAL HEARING

As expressly observed within the decision, (App. 18a), the Secretary proceeded in the post-hearing brief on a theory different from that relied upon in the issuance of the citations and advanced for trial. Changing from a position that Tom Moore was not present on the day before the inspection to a position that he was not a "competent person" despite the absence of trial by consent of the issue.

The Sixth Circuit (whose decisions bound the trial court) clearly held that the Secretary is held to the amendment procedures of Federal Civil Rule 15(b), ***Secretary of Labor v. Briggs Construction Co.,*** 942 F.2d 318 (6th Cir. 1991) and the record establishes unquestionably that the Secretary plainly did not comply with them in this instance.

Having once invoked them, the Secretary should have had resort to them again to permit counsel to meet the argument with appropriate evidence.

As observed by the District of Columbia Circuit in ***National Realty & Construction Co. v. OSHRC,*** 489 F.2d 1257 (D.C. Cir. 1973):

> **"An employer is unfairly deprived of an opportunity to cross examine or to present rebuttal evidence and testimony when it learns the exact nature of its alleged violation only after the hearing."** 489 F.2d 1257, 1267.

Additionally, the trial judge:

A. Failed to follow his own published opinion to the effect that a ladder is not required under the provisions of 29 C.F.R. § 1926.651(c)(2) to exit a trench sloped at an angle of 34°. ***Concrete Construction Co.,*** 15 O.S.H.Cas. (BNA) 1881 (89-2019, ALJ - Digest) (reviewed on other issues, 15 OSHC 1615).

B. Treated as non-prejudicial the unexcused failure of the Secretary to timely commence the instant enforcement proceeding.

C. Drew conclusions wholly unsupported by the record to the effect that at the time of the citation, Piping was engaged in a business "affecting commerce".

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ALBERT T. BROWN, JR.
BROWN & WARNOCK
2550 Kroger Bldg.
1014 Vine St.
Cincinnati, Ohio 45202
(513) 621-2825

Attorney for Petitioner

APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

NOT FOR PUBLICATION

93-3565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PIPING OF OHIO, INC.,	*	
Petitioner,	*	ON APPEAL FROM THE
	*	OCCUPATIONAL SAFETY
vs.	*	AND HEALTH REVIEW
	*	COMMISSION
SECRETARY OF LABOR, ET AL.,	*	
	*	(Filed June 08, 1994)
Respondents.	*	

BEFORE: KEITH, SUHREINRICH, Circuit Judges, and JOINER, Senior District Judge.*

PER CURIAM: Petitioner, Piping of Ohio, Inc. ("Piping"), appeals the Occupational Safety and Health Review Commission ("Commission") finding it violated several underground excavation standards. For the reasons stated below, we **AFFIRM** the Commission's decision.

---

*The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

In November 1991, Piping, a company specializing in underground construction, replaced a water line at the Armco Steel Plant in Middleton (sic.), Ohio. To reach the water line, Piping excavated two trenches, one located between steam pit No. 54 and steam pit No. 53 ("the east trench"), and the other between steam pit No. 53 and steam pit No. 52 ("the west trench").

On November 20, 1991, a business agent of a local ironworkers union observed a Piping employee in the east trench. Because the agent believed the walls of the trench were insufficiently sloped, he notified the area office of the Occupational Safety and Health Agency ("OSHA") of a possible safety hazard.

The same day an OSHA industrial hygienist was performing a health inspection at Armco's plant. The OSHA area office contacted the hygienist and instructed him to inspect Piping's excavation for imminent danger. The hygienist visited the site after work hours, photographed the site, and reported his findings to the OSHA area office. The next day OSHA Compliance Officer John Boylan ("Boylan") inspected the Piping worksite.

On December 3, 1991, after Boylan's inspection, the Secretary of Labor ("Secretary") issued two citations alleging three serious violations of the Occupational Safety and Health Act of 1970 ("Act") and a fourth willful violation of the Act. The Secretary alleged Piping violated the Act by failing to: (1) properly train its employees in violation of 29 C.F.R. § 1926.21(b)(2); (2) provide a safe egress from an excavation in violation of 29 C.F.R.

§ 1926.651(c)(2); (3) have a competent person available to conduct daily inspections of the excavation in violation of 29 C.F.R. § 1926.651(k)(1); and (4) adequately slope the walls of the excavation in violation of 29 C.F.R. § 1926.652(a)(1). Additionally, the Secretary alleged the § 652(a)(1) violation was serious and repeated. Piping contested all the citations.

An OSHA Review Commission administrative law judge ("ALJ") conducted a hearing, affirmed the citations and imposed civil penalties. Although Piping sought review of the ALJ's decision, review was denied. On April 5, 1993, the ALJ's decision became the final order of the Commission. This timely appeal followed.

II.

On appeal, Piping argues the ALJ erred by failing to dismiss the action where the Secretary's filing of the complaint was untimely, and by concluding Piping affected interstate commerce. Additionally, Piping argues the ALJ's decision is not supported by substantial evidence, is contrary to law, and contains prejudicial procedural errors.

Having carefully considered the record and the issues presented in the briefs and at oral argument, we find an error warranting reversal. We, therefore, **AFFIRM** the decision of the Honorable James D. Burrough, Administrative Law Judge, finding Piping failed to: (1) properly train its employees in violation of 29 C.F.R. § 1926.21(b)(2); (2) provide safe egress from an excavation in violation of 29 C.F.R. § 1926.651(c)(2); (3) have a competent person available to conduct daily inspections of

the excavation in violation of 29 C.F.R. § 1926.651(k)(1); and (4) adequately slope the walls of the excavation in violation of 29 F.R. § 1926.652(a)(1) which was a serious and repeated violation.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR, Complainant, v. **PIPING OF OHIO,** Respondent.	OSHRC Docket No. 91-3481

Appearances:

Christopher J. Carney, Esquire
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio
For Complainant

Albert T. Brown, Jr., Esquire
Brown & Warnock
Cincinnati, Ohio
For Respondent

Before Administrative Law Judge James D. Burroughs

DECISION AND ORDER

Piping of Ohio, Inc. (Piping), specializes in underground construction (Tr. 122). In November of 1991, it was engaged in the replacement of a water line at the

Armco Steel plant in Middleton (sic.), Ohio (Tr. 92). Compliance Officer John Boylan commenced an inspection of the plant on November 21, 1991. On December 3, 1991, Piping was issued a serious and a willful citation, which have been timely contested.

In item 1 of Citation No. 1 (serious), Piping is alleged to have violated § 1926.21(b)(2), for failure to instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his or her work environment. Item 2 charges Piping with a violation of § 1926.651(c)(2), for failure to provide a means of safe egress for employees from an excavation. Item 3 alleges a violation of § 1926.651(k)(1), for failure to have a competent person conduct daily inspections of the excavation. Citation No. 2 (willful) alleges a violation of § 1926.652(a)(1), for failure to provide an adequate protective system for employees working in the excavation. On May 8, 1992, the Secretary amended the complaint to allege, in the alternative, that item 1 of Citation No. 2 was either repeated or serious.

Piping denies that it violated any of the cited standards. It seeks dismissal of the allegations on the assertion that (1) the complaint was not timely filed, and (2) the Commission has no jurisdiction. It contends that it was not engaged in a business affecting commerce.

Facts

From November 19 to November 23, 1991, Piping was engaged in removing the old water line between steam pits Nos. 52 and 54 at the Armco Steel plant in Middleton (sic.), Ohio, and replacing it with a 14-inch

feed line (Tr. 91-92, 210). Piping had an ongoing relationship with Armco. It had performed more than ten excavations for Armco in the past (Tr. 682-683). In order to replace the old water line, Piping had to excavate two trenches, one between steam pit No. 54 and steam pit No. 53 (the east trench), and the other between steam pit No. 53 and steam pit No. 52 (the west trench). The project had a November 23, 1991, deadline (Tr. 92).

The pipe replacement began at steam pit No. 54 and proceeded west to steam pit No. 52. The water line had to be pressure tested after it was installed, so the trenches were left open until the completion of the project (Tr. 97). A steam pipe ran along the entire length of the south wall of both trenches (Tr. 65-66, 269). Concrete pier caps were located intermittently around the steam pipe (Tr. 269, 540). There were no pier caps along the north wall of the trenches. A nitrogen utility line was located at the base of the north wall. The existing water line was located between the nitrogen line and the steam pipe (Tr. 269).

Piping's contractual duty involved removal and replacement of an existing water line (Tr. 92). Each piece of pipe was approximately 21 feet long (Tr. 148-149). Piping would weld three pieces of pipe together above ground and then place the resulting 63-foot long section into the trench and weld it with a previously laid section of pipe. Two employees, Damon Auvil and Rob Yost, were required to weld connections in the trenches (Tr. 194-195). A third employee, Rick Lewis, was required to prime and tape weld connections while in the trenches. Lewis patched portions of the new pipe that had been scratched while being fished through the steam pits (Tr. 123, 125-131).

On November 20, 1991, George Kratzer, the business agent for Local 290 of the Ironworkers Union, observed an employee wearing a welding hood in the east excavation near steam pit No. 53 (Tr. 11, 16). Because Kratzer believed that the walls of the trench were not sufficiently sloped, he notified OSHA that he had observed a possible safety hazard (Tr. 21-22).

Jim Sweeney, an industrial hygienist with the Cincinnati, Ohio, OSHA area office, was at Armco's plant that day performing a health inspection. During his inspection, Sweeney received a message from his supervisor instructing him to inspect Piping's excavation as a possible imminent danger (Tr. 47). Sweeney went to the excavation site where work had ceased for the day (Tr. 52). Sweeney took three photographs of the site (Exhs. C-11, C-12, C-13), and then reported his findings to his area office (Tr. 67).

The next day, November 21, 1991, OSHA Compliance Officer John Boylan arrived at Piping's worksite and conducted an inspection (Tr. 257). On December 3, 1991, two citations were issued to Piping that gave rise to the present case.

The Late Filing of the Secretary's Complaint Is Not Grounds for Dismissal

At the beginning of the hearing, Piping moved to dismiss the Secretary's complaint on the grounds that it was untimely filed (Tr. 5). The motion was denied (Tr. 10). Piping raises the issue again in its post-hearing brief. Where an employer can make "a more particularized showing of prejudice following a hearing on the merits,"

a renewal of the motion may be made. *See Texas Masonry, Inc.*, **11 BNA OSHC 1835, 1837, 1983-84 CCH OSHD ¶ 26,803 (No. 82-955, 1984)**. The adequacy of the evidence is insufficient to warrant a finding favorable to Piping.

Two citations were issued to Piping on December 3, 1991. Piping filed its notice of contest on December 10, 1991. The Secretary notified the Commission of her receipt of the notice of contest on December 26, 1991. In accordance with Commission Rule 2200.34(a), the Secretary had until 30 days after she filed the notice to the Commission (until Monday, January 27, 1992) to timely file a complaint. The complaint was filed on February 3, 1992, a week late. Secretary's counsel explained that the delay in filing was the result of a clerical error (Tr. 7-8).

Piping contends that the tardiness in filing is in itself sufficient reason to dismiss the complaint. The decision of whether failure of a party to meet a filing deadline merits a default judgment against that party is a discretionary ruling for the judge. Rule 2200.41(a) states that, when a party moves for dismissal against the other party for failure to comply with the rules, "the Commission or Judge, in their discretion, *may* enter a decision against the defaulting party" (emphasis added).

Motions to dismiss based on the late filing of the Secretary's complaint are not new to the Commission. While a multitude of such motions have been filed with the Commission and its judges, few have been granted. In the recent case of *Ford Development Corporation*, **15 BNA OSHC 2003, 1992 CCH OSHD 11 ¶ ___ (No. 90-1505, 1992)**, the Commission reiterated the elements necessary for a favorable ruling on behalf of the employer. The

Secretary failed to transmit Ford's notice of contest to the Commission within fifteen working days, as required by Commission rules. The notice of contest was transmitted seven days late. The judge found this delay to be the innocuous result of a clerical error, and he denied the motion. The Commission upheld the judge's denial.

The Commission stated: "A demonstration of prejudice to the employer and contumacious conduct by the Secretary are among the more significant factors to take into account." The case of *Texas Masonry, Inc., supra,* was cited for the proposition that the employer must establish prejudice to it or contumacious conduct on the part of the Secretary before dismissal is warranted. The Commission considers dismissal a harsh sanction and will not grant a motion to dismiss without an adequate showing of these factors.

The Secretary's conduct is not properly characterized as contumacious. The delay has been attributed to a clerical error, not from any desire to deliberately delay the proceeding. The Commission's rules of procedure are designed to achieve prompt and orderly adjudication under the Act. It expects all parties to comply with the rules, but will not grant motions to dismiss for failure to follow the rules in the absence of a showing of prejudice or contumacious conduct.[1] The goal of the Act is to improve the safety and health of employees. Granting of such motion on procedural grounds defeats that purpose.

---

[1] The Commission and its judges, where justified, may impose other sanctions for failure to follow procedural rules.

Piping has not shown that it was prejudiced by the delay. The motion is denied.

Piping Was Engaged in a Business Affecting Interstate Commerce

Section 3(5) of the Act provides that, among other things, an employer is "a person engaged in a business affecting commerce." Commerce, according to § 3(3) of the Act, "means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof. . . . " Piping contends that the Commission does not have jurisdiction over it because the company performed work only in Ohio and, thus, was not engaged in "commerce" within the meaning of § 3(3) of the Act. The use of the words "affecting commerce" indicates that Congress intended to exercise fully its constitutional authority under the commerce clause.

It is well settled that the Secretary has the burden of pleading and proving jurisdiction. Several Commission and judicial decisions make it clear that it is quite easy to prove that an employer is engaged in a business affecting commerce. In *Marshall v. Anchorage Plastering Co.*, 570 F.2d 351 (9th Cir. 1978), the ninth circuit found that an employer was engaged in a business affecting commerce because it hired employees at a union hall, used the telephone and mail, and purchased supplies from out of state. In *United States v. Dye Construction Co.*, 510 F.2d 78

(10th Cir. 1975), the record reflected that Dye had purchased several items of heavy equipment and trucks produced by out of state sources. The court concluded (510 F.2d at 83):

> The use of supplies which are part of commerce has been held sufficient. See *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 11, 13 L.Ed.2d 20 (1964) *and Von Solbrig Hospital, Inc. v.* NLRB, 465 F.2d 173 (7th Cir. 1972). Since it is irrelevant then whether Dye itself was engaged in commerce, we are constrained to hold that its activities are such as to justify the regulation in question.

The court's conclusion recognizes that a business does not have to be engaged in interstate commerce to affect commerce.

In *Avalotis Painting Co.*, **9 BNA OSHC 1226, 1981 CCH OSHD ¶ 25,157 (No. 76-4774, 1981)**, the Commission found that the use of products manufactured out of state that had moved in commerce was sufficient to establish jurisdiction. The Commission stated (**9 BNA OSHC at 1227**):

> * * * It is sufficient to note that the record establishes Respondent's use of products manufactured out of state that had moved in commerce. An employer's use of goods produced out of state has been held to "affect" interstate commerce under the Act. *United States v. Dye Construction Co., supra. See also Katzenbach v. McClung*, 379 U.S. 294 (1964).

There is no logical way Piping can be construed as having a business not affecting commerce. It was fulfilling a contract with Armco which affected competition.

The fact it was performing the job affected the market for others in the industry. Competition had to adjust to a diminishing market. Loss of a market for goods or services has a profound affect on commerce. Even activity that is purely intrastate in character may affect commerce among the states. Piping was performing work for Armco Steel, which is a major steel company, owned in part by a Japanese corporation (Tr. 110). Piping used the U. S. Postal Service and telephones in conducting its business operations. It made long-distance calls and forwarded letters to out-of-state businesses (Tr. 112-113). It owned a welding truck purchased in Kentucky and a boom truck purchased in Pennsylvania (Tr. 92-93). Piping's actions in performing work for an international company, and in purchasing equipment from out-of-state, indisputably affected commerce.

The motion is denied.

Citation No. 1
Item 1 – Alleged Violation of § 1926.21(b)(2)

The Secretary charged Piping with the violation of § 1926.21(b)(2) in that Rob Yost, Damon Auvil, Rick Lewis, and Rob Huntsberger were not adequately instructed in the avoidance of unsafe conditions and the standards for working in excavations. The standard provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

This standard requires, at a minimum, that employees receive instruction in safe work habits applicable to his work environment. This includes instructions on how employees may recognize and avoid unsafe conditions. *National Industrial Construction, Inc. v. OSHRC*, 583 F.2d 1048 (8th Cir. 1978).

Piping did not have a written safety program (Tr. 135-136). Boylan interviewed Piping's employees and ascertained that they were unfamiliar with changes in the excavation standard and that any safety training they had was inadequate for compliance with the standard (Tr. 320-324). Piping held informal Wednesday evening meetings at Tom Moore's house, at which the employees turned in their time cards. The meetings were not mandatory (Tr. 136, 171).

Rick Lewis was a laborer for Piping. Lewis had no prior experience in underground construction before he was hired by Piping (Tr. 122). When he was hired, he received no written safety rules (Tr. 135). Lewis described his verbal training: "I was told what to look for before I got in the ditch. . . . Cracked banks, loose dirt, and anything that was unsafe" (Tr. 138). When asked specifically what kind of training he had that taught him how to recognize an unsafe condition, Lewis replied, "Just that the bank was falling or cracking. You could look at it and tell" (Tr. 139). Lewis stated that he had no other safety training (Tr. 139). Lewis admitted that at the time of Boylan's inspection, he had not been informed by Piping of changes in the excavation standard (Tr. 141).

Robert Yost was a welder for Piping. Like Lewis, Yost had no previous experience working in underground construction before he started working with Piping (Tr. 161-162). Yost testified that his safety training at Piping consisted of being told "to watch and keep an eye for looseness and cracking or anything. If you see anything falling in, let them know. . . . It was just generally they would tell you to keep an eye on it all the time for any changes" (Tr. 169).

Damon Auvil, a welder with Piping, also had no previous experience in underground construction (Tr. 205). Like Lewis and Yost, Auvil stated that his training entailed being told to look out for dangers (Tr. 213). Auvil agreed that the training was "a common sense type of training" (Tr. 214). Auvil was vague when asked about the sloping requirements for different soil classifications (Tr. 221):

> Q.: When you are confronted with a Type C classification of soil, how sloped should the walls be? How should the walls be sloped?
>
> Auvil: Way, way back, I mean, way back where you should have a box or something in there.
>
> Q.: If the soil is classified as Type B soil, how should the walls be sloped?
>
> Auvil: You have to get on the job and learn it that way. That's what you have to do.
>
> Q.: Should the walls be sloped?
>
> Auvil: Yes, they should.
>
> Q.: How should they be sloped?
>
> Auvil: It is hard to say. It is just common sense. You could tell whether that ditch is safe or not.

Robert (Chief) Huntsberger was the equipment operator on the Armco Steel project (Tr. 603). He stated that he sometimes slopes trenches he is digging to a degree that he believes is safe, but that is less than what the excavation standard requires (Tr. 613-614).

The testimony of Piping's employees establishes the Secretary's case that they did not receive adequate instruction in the recognition and avoidance of safety hazards. They were unaware of the requirements of the excavation standard. Piping's employees were relying on intuition, and not specific guidelines, to tell them whether or not a trench was safe. Telling employees to watch out for hazards is not the same as instructing them in the recognition and avoidance of hazards. Piping was in violation of § 1926.21(b)(2).

Item 2: § 1926.651(c)(2)

The Secretary alleged that Piping violated § 1926.651(c)(2), which provides:

> A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

The east and west excavations were each approximately 7 feet deep (Tr. 275-276), 11 feet wide at the top (Tr. 298), and 5 feet wide at the bottom (Tr. 296). Each trench was approximately 200 feet long (Exh. C-1; Tr. 193-194). Lewis, Yost, and Auvil were each in the east trench on November 20, 1991 (Tr. 125, 162-163, 207). No ladder was provided for egress from the trench (Tr. 134).

The employees exited the trench by stepping onto the water line and hoisting themselves onto a pier cap along the south wall. The distance from the top of the water line to the pier cap was 3 to 4 feet (Tr. 133, 167, 212-213 328).

On November 21, 1991, Auvil and Yost were working in the west trench, approximately 15 feet from steam pit No. 53 (Tr. 258, 261). Boylan observed them exit the trench by walking up the south side of the trench, which was sloped at a 34° angle (Tr. 264, 328). The initial step to the sloped portion of the south wall was 2 feet. Loose soil was on the south wall (Tr. 329). The ramp was inadequate to comply with the standard. The soil was loose, and the initial step in gaining egress from the trench was in excess of 2 feet.

The violation is affirmed.

Item 3: § 1926.651(k)(1)

Section 1926.651(k)(1) provides:

> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

Section 1926.650(b) provides that "*Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

Thomas Moore is the secretary and treasurer for Piping (Tr. 91). He was the designated competent person at the site. The Secretary proceeded on the theory, based on Boylan's testimony, that Moore was not present at the site on November 20, 1991. (Tr. 336, 339). Moore testified that Boylan must have misunderstood him during their interview. Boylan stated that he was on the site on November 20, but not the entire day (Tr. 97-98).

In her post-hearing brief, the Secretary proceeds on the theory that, even if Moore was present every day of the project, he was not a competent person within the meaning of the standard. Moore told Boylan that he had not seen a copy of the 1989 excavation standard (Tr. 336). Moore was unaware of the changes in the standard (Tr. 338). "Evidence that the employees were unaware of particular safety requirements, because of a lack of specific instruction, establishes a violation." *R & R Builders, Inc.*, **15 BNA OSHC 1383, 1390, 1992 CCH OSHD ¶ ___ (No. 91-282, 1992)**.

Moore had the authority to take corrective action to eliminate hazards. He conducted a visual inspection of the trenches every day (Tr. 686). Subpart P, Appendix A(c)(1), requires that the competent person classify the soil as either Stable Rock, Type A, Type B, or Type C soil. Appendix A(c)(2) requires the competent person to make

the classification "based on at least one visual and at least one manual analysis." Moore classified the excavation soil as Type A. As will be discussed, *infra*, the soil was actually Type B. When asked if he had made any tests of the soil, Moore replied, "Other than visual, no, sir" (Tr. 701).

The Secretary has established that Moore was not a competent person within the meaning of the standard. He was not aware of changes made in the excavation standard, and he failed to follow the required procedure for the classification of soil. The violation is affirmed.

Classification of Violations

The Secretary submits that the violations were serious within the meaning of section 17(k) of the Act. In order to prove a serious violation, the Secretary must show that there is a substantial probability that death or serious physical harm could result from the condition in question. The Secretary need not prove that an accident is probable. It is sufficient if an accident is possible and the probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Division,* **8 BNA OSHC 1055, 1980 CCH OSHD ¶ 24,275 (No. 76-3942, 1980)**. The Secretary must also establish that the employer knew or with the exercise of reasonable diligence should have known of the existence of the violation. The knowledge element is directed to the physical conditions which constitute a violation. *Southwestern Acoustics & Specialty, Inc.,* **5 BNA OSHC 1091, 1977-78 CCH OSHD ¶ 21,582 (No. 12174, 1977)**.

The failure to instruct in the recognition and avoidance of unsafe conditions exposed employees to the possibility of a trench collapse. In such an event, employees could suffer death from crushing or suffocation. The violation of § 1926.651(c)(2) would have denied employees a quick exit from the trench in the event of a cave-in. The violation of § 1926.651(k)(1) also exposed employees to a cave-in. The misclassification of the soil resulted in the walls being inadequately sloped. The violations were serious.

Citation No. 2
Item 1: § 1926.652(a)(1)

The Secretary charged Piping with a willful violation of § 1926.652(a)(1), which provides:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
>
> (i) Excavations are made entirely in stable rock; or
>
> (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Boylan took three soil samples from the excavation (Tr. 299). These samples were sent to OSHA's Salt Lake City laboratory, where they were analyzed and classified as Type B soil (Tr. 454). Table B-1 of Subpart P, Appendix B, establishes that the maximum allowable slope for an excavation in Type B soil is 45° from the horizontal. Boylan measured the north wall of the west trench and

found its slope to be 52° (Tr. 264). The north wall of the east trench was 68° (Tr. 278).

The Secretary has established that Piping was in violation of § 1926.652(a)(1). She alleged that the violation was willful. A violation of the Act is willful if "it was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety." *Simplex Time Recorder Co.*, **12 BNA OSHC 1591, 1595, 1984-85 CCH OSHD ¶ 27,456, p. 35,572 (No. 82-12, 1985)**. Trial of the issue of willfulness focuses on the employer's state of mind and general attitude toward employee safety to a greater extent than would trial of a non-willful violation. *Seward Freight*, **13 BNA OSHC 2230, 2234, 1989 CCH OSHD ¶ 28,509, p. 37,787 (No. 86-1691, 1989)**. In *Williams Enterprises, Inc.*, **13 BNA OSHC 1249, 1986-87 CCH OSHD ¶ 27,893 (No. 85-355, 1986)**, the Commission held:

> It is not enough to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation, serious or nonserious . . . A willful violation is differentiated by a heightened awareness-of the illegality of the conduct or conditions and by-state of mind- conscious disregard or plain indifference . . . It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation. *Williams*, **13 BNA OSHC at 1256-1257, 1986-87 CCH OSHD at p. 36,589**.

E. L. Jones and Sons, Inc., **14 BNA OSHC 2129, 2133, 1991 CCH OSHD ¶ 29,264 (No. 87-7, 1991)**. In *Calang Corp.*, **14 BNA OSHC 1793, 1991 CCH OSHD ¶ 29,080, p. 38,870**

(No. 85-319, 1990), the Commission reiterated the standard of review for deciding allegations of willful misconduct (citations omitted):

> A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete . . . Also, a violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one-whether the employer's belief concerning the interpretation of a standard was reasonable under the circumstances.

Piping's violation of the cited standard does not rise to the level of willfulness. The Secretary has not shown that heightened awareness of the illegality of the inadequate sloping would ascend the violation to the realm of "willful."

In the alternative, the Secretary charged that the violation of § 1926.652(a)(1) was repeated. "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, **7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979)**.

Piping was cited for a violation of § 1926.652(b) on October 24, 1989 (Exh. C-16), for failure to shore or slope the sides of trenches in unstable or soft material 5 feet or more in depth. This violation of the standard is substantially similar to Piping's violation of § 1926.652(a)(1) in

the present case. A settlement agreement affirming the citation as serious was entered on April 17, 1990 (Exh. C-17). A decision and order approving the settlement was issued and became a final order of the Commission on June 7, 1990 (Exh. C-17). The hazard presented by both violations is that of a cave-in. The violation will be affirmed as a repeated violation.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining an appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

At the time of the inspection, Piping had ten employees. Piping demonstrated good faith by fully cooperating with Boylan during his inspection (Tr. 364). Piping had been previously cited for a violation of the excavation standard (Exhs. C-16, C-17; Tr. 352). The hazard created by noncompliance with the provisions of the excavation standard was the possibility of a fatal cave-in. The gravity of each of the violations was severe.

Upon due consideration of these factors, it is determined that the following penalties are appropriate:

Citation No. 1

Item	Standard	Penalty
1	§ 1926.21(b)(2)	$2,000
2	§ 1926.651(c)(2)	$2,000
3	§ 1926.651(k)(1)	$2,000

Citation No. 2

Item	Standard	Penalty
1	§ 1926.652(a)(1)	$4,000

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is

ORDERED: (1) That item 1 of Citation No. 1, alleging a serious violation of § 1926.21(b)(2), is affirmed and a penalty of $2,000.00 is assessed;

(2) That item 2 of Citation No. 1, alleging a serious violation of § 1926.651(c)(2), is affirmed and a penalty of $2,000.00 is assessed;

(3) That item 3 of Citation No. 1, alleging a serious violation of § 1926.651(k)(1), is affirmed and a penalty of $2,000.00 is assessed; and

(4) That item 1 of Citation No. 2, alleging a willful violation of § 1926.652(a)(1), is affirmed as a repeat violation and a penalty of $4,000.00 is assessed.

/s/ James D. Burroughs
JAMES D. BURROUGHS
Judge